

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**  
**Appeal from the Court of Appeals**  
**Fort Hood, P.J., and Griffin and Donofrio, JJ.**

**THE PEOPLE OF THE  
STATE OF MICHIGAN,**

Plaintiff-Appellee,

SC: 128376  
COA: 251406  
Wayne CC: 02-003303-01

-VS-

**DARRYL PEALS**

Defendant-Appellant.

\_\_\_\_\_/

WAYNE COUNTY PROSECUTOR  
Attorney for Plaintiff-Appellee

ROBERT TOMAK (P 26506)  
Attorney for Defendant-Appellant

**BRIEF ON APPEAL - APPELLANT**

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## **STATEMENT OF BASIS OF JURISDICTION**

Defendant-Appellant Darryl Peals was convicted in the Wayne County Circuit Court on September 9, 2003. A judgment of Sentence was entered on September 24, 2003. A Claim of Appeal was filed September 30, 2003 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated September 25, 2003. The Michigan Court of Appeals affirmed Defendant-Appellant's conviction in an unpublished opinion dated February 15, 2005. This Court granted Defendant-Appellant's application for leave to appeal in an order dated October 19, 2005.

## **JUDGMENT APPEALED FROM AND RELIEF SOUGHT**

Defendant, Darryl Peals, was convicted of felon in possession of a firearm and felony firearm following a jury trial on September 9th, 2003 in the Wayne County Circuit Court Criminal Division, the Honorable Craig S. Strong presiding. On September 24, 2003 he was sentenced to one year probation on the felon in possession charge and mandatory two years in prison on the felony firearm count. On September 26, 2003 Defendant filed a request for appellate review of his conviction and timely filed his brief on appeal. His conviction was affirmed by the court of appeals on February 15, 2005.

Defendant appeals the February 15, 2005 Court of Appeals Order affirming his conviction and seeks reversal of that Order and reversal of his conviction with prejudice in the trial court.

## STATEMENT OF QUESTION INVOLVED

**WAS THE DEFENDANT'S CONVICTION CONTRARY TO THIS COURT'S HOLDING IN PEOPLE V. HILL 433 MICH 464, 446 NW2D 140 (1989); IS THERE A CONFLICT AMONGST COURT OF APPEALS OPINIONS AS TO THE DEFINITION OF A FIREARM AND IF THERE IS A CONFLICT SHOULD THIS COURT RESOLVE THAT CONFLICT?**

The lower court answered no as to the conviction.

The Defendant-Appellant answers yes.

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Appellant, Darryl Peals, was convicted of felon in possession of a firearm and felony firearm following a jury trial on September 9th, 2003 in the Wayne County Circuit Court Criminal Division, the Honorable Craig S. Strong presiding. On September 24, 2003 he was sentenced to one year probation on the felon in possession charge and mandatory two years in prison on the felony firearm count.

At the trial prosecution witness Officer Pessina testified that he was an expert in firearms identification. (App. p. 14a). He testified that he examined the weapon and stated that the weapon did not function as it was mechanically designed to function. (App. p. 16a). He said the top portion of the weapon was cracked and missing (App. p. 17a), that it had no magazine (App. p. 18a). The officer answered in the affirmative on direct that he agreed it was a Lorsin (name of mfg.) Handgun but it's broken and there were missing pieces and parts broken. (App. p. 19a). He stated that the weapon is manufactured to have a slide that protrudes to the back end of the barrel. "And if you look at the slide itself you can see it's cracked off. This isn't a machine piece you can tell that it's broken." (App. p. 20a).

Officer Pessina testified that the gun was missing the firing pin. (App. p. 21a).

The defendant-appellant testified in his own behalf. He stated that the gun was lying in the grass in a couple pieces. He stated that he could sell it for scrap metal. He stated that when he took the safety off it fell apart. (App. p. 24a).

The jury found defendant-appellant guilty of both counts, count one possession of a firearm by a felon and count two possession of a firearm during commission of a felony.



Mr. Peals appealed his conviction by right, and the court of appeals affirmed in an unpublished opinion issued on February 15, 2005. Responding to Mr. Peal's application for leave to appeal, this Court granted leave on October 19, 2005.

## ISSUE PRESERVATION/STANDARD OF REVIEW

The issue of what constitutes a “pistol” under MCL 750.222 has been raised at the trial level and at the court of appeals.

Whether a statute has been properly applied is reviewed *de novo*. People v. Hegwood, 465 Mich 432, 436 (2001).

## ARGUMENT

The gist of the defendant-appellant's argument is the proposition that this Court in the case of People v. Hill, 433 Mich 464, 446 NW2d 140 (1989) meant to say that where a firearm is totally inoperable given its current mechanical condition and could not readily be made operable it does not meet the definition of a "firearm" in MCL 750.222(d).

Throughout the Court's discussion in People v. Hill of the legislative intent of the statutes proscribing the act of possession of a weapon there is the consistent observance of the distinction between "temporary inoperability" and "permanent inoperability." In dealing with the definitional status of the disassembled shotgun in the Hill case the court's focus immediately went from what is a "shotgun" to what is a "firearm" and thence - in response to the defendant's claim that disassembly of the weapon somehow changed its inherent nature such that it was no longer a shotgun - to the logical conclusion that a shotgun does not cease being a "weapon" under the statute by it being in a disassembled state. "A deadly weapon does not cease to be such by becoming temporarily inefficient, nor is its essential character changed by dismemberment if the parts, with reasonable preparation, may be easily assembled so as to be effective." Hill supra.

This Court in Hill observed that prior appellate court panels dealing with the question of possession of a firearm had been appropriately cognizant of the legislative intent behind statutes proscribing such possession. [i.e. to suppress the act or practice of going armed and being ready for offense or defense in case of conflict with another, and to outlaw instruments ordinarily used for criminal and improper purposes]; and, cited People v. Bailey, 10 Mich App 636; 160 NW2d 380 (1968) ("...weapons should not be carried where they might be used to take lives..."); People v.

Jiminez, 27 Mich App 633; 183 NW2d 853 (1970) (“...when used in a statute, the term ‘dangerous weapons’ should not be narrowly construed by the court...”); People v. Gibson, 94 Mich App 172; 288 NW2d 366 (1979) (“... court of appeals again followed the primary and fundamental rule of statutory constructions which is to ascertain and give effect to the purpose and intention of the Legislature”); White v. Ann Arbor, 406 Mich 554; 281 NW2d 283 (1979) (“...words of statute to be considered in light of general purpose sought to be accomplished or the evil sought to be remedied.”).

This Court further observed in Hill, that appellate courts had held that it did not matter that the weapon was only currently inoperable insofar as the legislative intent was concerned, citing People v. Jackson, 108 Mich App 346; 310 NW2d 238 (1981) (reiterating broad construction of statutes prohibiting the carrying of firearms); and, People v. Stephenson, 94 Mich App 300; 288 NW2d 364 (1979) (broad construction means prohibiting firearms even if they are inoperable because they are unloaded); and, People v. Sanchez, 98 Mich 562; 296 NW2d 312 (1980) (the distinction between unloaded and inoperable firearms is meaningless).

This Court went on to observe that even where a weapon was temporarily inoperable and thus not capable of propelling a dangerous projectile, still the appellate courts have sustained convictions for the illegal possession of a firearm and cited People v. Boswell, 95 Mich App 405; 291 NW2d 57 (1980) wherein it was held that if a gun is temporarily jammed and thus not at that moment operable did not mean that it still wasn’t a “firearm” as prohibited by the gun possession statutes; and, People v. Brooks, 135 Mich App 193; 353 NW2d 118 (1984) (firearm still a firearm even if it is in a state of temporary disrepair and for that reason incapable of firing)

This Court finally noted uncritically that the Michigan Criminal Jury Instructions recognize

that a gun must be “totally inoperable as a firearm and cannot be readily repaired” before this can be raised as a defense to a charge of illegal firearm possession. CJI 11:1:09

In such manner then did this Court in Hill provide a survey of and cite with approval those prior appellate level cases that had properly interpreted the statutes prohibiting firearm possession.

The appeals court case of People v. Huizenga, 176 Mich App 800; 439 NW2d 922 (May 1, 1989) issued just prior to this Court’s issuance of its ruling in People v. Hill in September of 1989 would seem to have been entirely consistent with the not as yet rendered Hill decision and its cited case law. Huizenga would in fact seemed to have been an encapsulation of those prior decisions that had dealt only impliedly with the precise definition of the term “firearm.” Its holding contained an inclusive definition of the term “firearm” and the logic and reason supporting that definition.

Thus, the panel in Huizenga stated:

“We believe that it was eminently reasonable for the Legislature to declare that an unloaded firearm falls within the concealed weapons statute. For example, a pistol may be carried by a defendant in one pocket with the ammunition in another. Under that scenario, the firearm could be loaded in seconds and used as a deadly weapon. Had the Legislature not included unloaded firearms within the statute, anyone would be able to circumvent the statute by merely unloading their firearm and yet carry the live ammunition separate from the firearm. By the same token, there are guns which can easily be broken down into separate, inoperable components. For the same reasons that an unloaded pistol is proscribed by the Legislature, we believe that inoperable firearms which can readily be made operable should be considered proscribed by the concealed weapons statute. However, to hold that all inoperable firearms fall within the definition of “pistol” too loosely construes the statute.”

In that case the pistol was inoperable in that it was totally incapable of propelling a dangerous projectile. The hammer was broken in half and the defendant could not have readily made the pistol operable. That court concluded that therefore the pistol could not have been a “firearm” as defined in the statute.

The appellate court certified its decision in Huizinga as being in conflict with People v.

Sanchez and People v. Jiminez.; however, this Court declined to further consider the question.

Following this Court's declination to revisit the issue ( People v. Huizenga, 433 Mich 910; 448 NW2d 718 (1989)( Lv to app Denied) the appellate court issued its ruling in People v. Thompson, 189 Mich App 85; 472 NW2d 11 (1991) in which it stated simply that "Operability is not and has never been an element of felony-firearm and that to the extent People v. Huizenga can be read otherwise, we reject its reasoning."; and, People v. Brown, 249 Mich App 382; 642 NW2d 382 (2002) a felon in possession case (like the case *sub judice*) wherein the appellate panel stated that it was now applying the "Thompson analysis" to felon in possession cases. The Brown panel stated that its holding was in compliance with People v. Hill by attributing to Hill the rule that "... operability of a gun [is] irrelevant..." otherwise the legislative intent of possession of firearms statutes is thwarted. That asserted attribution is off base; however, because Hill did not categorically hold that operability was irrelevant. Hill distinguished between temporary and permanent inoperability in its citation of cases and the jury instruction having to do with inoperability; plus, Hill stated, "Temporarily inoperable firearms **which can be made operable within a reasonable time** fall within the purview of the statutes that govern the use and possession of firearms." (emphasis added). Furthermore, there simply is no attribution of legislative intent expressed in Hill or anywhere else to prohibit mere possession by anyone of a totally and permanently inoperable weapon.

Thus it appears that the appellate level courts since Huizenga have ignored the notion of permanent inoperability despite this Court's opinion in Hill which saw no contradiction between those appellate level cases found to be carrying out the legislative intent yet recognizing the idea of permanent inoperability; and, despite Hill's uncritical citation of the criminal jury instructions

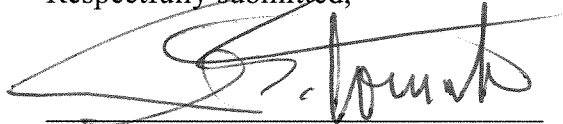
which recognize the defense of total inoperability.

In the instant case the evidence clearly establishes that the gun was totally inoperable and could not be readily repaired. Contrary to what the prosecutor stated in his appellee brief in the court of appeals (App. p. 25a) the officer testifying did not state that the "...handgun could be made to fire one round if the firing pin and springs were replaced." Rather, those were the words of the prosecutor Mr. Casey in prefacing his question when he said "If it had all of the springs and you testified all the firing pins and bullets maybe it could fire at least one shot but what would--" to which the witness answered, (in relevant part) "If this weapon fired a round with the springs and without having the ejector stop..." (App. p. 23a). Previously this witness was asked by the defense, "But could you tell me if you put some of these parts in that with that broken slide as it is what would be likely to happen if you tried to fire a round from that gun?..." to which the witness answered, "To the best of my knowledge the way this slide sits right now with the broken piece I don't even know that it would properly chamber a round." (App. p. 22a). Thus, it was the witness's testimony that the gun lacked more than just a firing pin and spring to make it operable. "The top portion of the weapon was cracked and missing." (App. p. 17a) "This weapon is manufactured to have a slide that protrudes to the back end of the barrel. And if you look at the slide itself you can see it's cracked off. This isn't a machine piece you can tell that it's broken." (App. p. 20a).

**RELIEF**

Defendant-appellant asks this Honorable Court to reverse the Court of Appeals affirmation of his felon in possession conviction and vacate that conviction with prejudice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. Tomak', written over a horizontal line.

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Dated: November 25, 2005